

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2)
3 In the Matter of)

4)
5 Indivisible Kentucky, Inc.)
6)

MUR 7286

7 **SECOND GENERAL COUNSEL'S REPORT**

8 **I. ACTIONS RECOMMENDED**

9 (1) Take no further action other than to issue a letter of caution to Indivisible Kentucky,
10 Inc. ("IKY"); (2) approve the appropriate letters; and (3) close the file.

11 **II. BACKGROUND**

12 This matter involves allegations that IKY, a non-profit corporation organized under
13 section 504(c) of the Internal Revenue Code, made disbursements for billboards expressly
14 advocating the defeat of Senator Mitch McConnell but failed to report those payments as
15 independent expenditures, disclose its donors, and include disclaimers on its internet
16 communications, in violation of the Federal Election Campaign Act of 1971, as amended (the
17 "Act").¹

18 On July 17, 2018, the Commission found reason to believe that IKY violated 52 U.S.C.
19 § 30104(c) and (g) by failing to report independent expenditures and identify contributors.² The
20 Commission also took no action at that time with respect to the allegation that IKY violated
21 52 U.S.C. § 30120 by failing to include disclaimers on solicitations posted on its website.³
22 Finally, the Commission authorized the use of compulsory process to seek information regarding

¹ First Gen. Counsel's Rpt. at 1-2 ("First GCR").

² Certification ¶ 3(a) (July 17, 2018).

³ *Id.* ¶ 3(b).

1 the costs for IKY's billboard advertising and the contributions made to further those
2 communications.⁴

3 **III. RESULTS OF INVESTIGATION**

4 The investigation established that IKY paid for two billboards that were displayed in July
5 and August of 2017 in Louisville, Kentucky, at a total cost of \$10,100.⁵ IKY stated that it
6 received one \$10,000 contribution from Rita Osborn to finance the billboards.⁶ IKY provided
7 copies of the service contract, dated June 28, 2017, from Maloney Outdoor Advertising for the
8 billboards; a canceled check, dated July 10, 2017, in the amount of \$10,100 from IKY to
9 Maloney to pay for the billboards; and a canceled check, dated July 3, 2017, and a deposit slip,
10 dated July 5, 2017, for the \$10,000 contribution.⁷

11 **IV. DISCUSSION**

12 Under the Act, "every person (other than a political committee) who makes independent
13 expenditures in an aggregate amount or value in excess of \$250 during a calendar year" must file
14 a statement disclosing information about the expenditures,⁸ including the identification of each
15 person who made a contribution in excess of \$200 to the person filing such statement which was

⁴ *Id.* ¶ 3(d).

⁵ IKY Resp. at 1 (Dec. 13, 2018). IKY stated that it spent \$4,050 for one of the billboards and \$6,050 for the other. *Id.*

⁶ *Id.* at 2.

⁷ *Id.* at 3-6.

⁸ For independent expenditures in excess of \$250 during a calendar year with respect to a given election, a quarterly report must be filed for any quarterly period in which the independent expenditures exceed \$250 and any subsequent quarterly period during the calendar year when additional independent expenditures are made. 52 U.S.C. § 30104(c)(2); 11 C.F.R. § 109.10(b). For independent expenditures aggregating \$10,000 or more within a calendar year with respect to a given election any time up to and including the 20th day before the election, a 48-Hour Report must be filed disclosing those expenditures. 52 U.S.C. § 30104(g)(2); 11 C.F.R. § 109.10(c).

1 made for the purpose of furthering an independent expenditure.⁹ IKY received one \$10,000
2 contribution for the billboards, and it spent \$10,100 on them, but it filed no disclosure reports
3 with the Commission. Thus, the facts confirm that IKY failed to disclose its independent
4 expenditures and the identity of a donor who made a contribution to further those expenditures.

5 Given the amount in violation, however, we do not believe that this matter warrants
6 further enforcement action.¹⁰ We recommend that the Commission take no further action as to
7 IKY concerning the violations of 52 U.S.C. § 30104(c) and (g), other than to issue a letter of
8 caution about the Act's independent expenditure reporting requirements.¹¹ For the same reasons,
9 we recommend that the Commission take no further action as to the allegation that IKY violated
10 52 U.S.C. § 30120 by failing to include a disclaimer on its website, and close the file.¹²

⁹ 52 U.S.C. § 30104(c)(1), (2); 11 C.F.R. § 109.10(b), (e)(1)(i)-(v). Since the Commission's reason to believe findings in this matter, a district court vacated 11 C.F.R. § 109.10(e)(1)(vi), which addressed reporting by persons other than political committees that make independent expenditures aggregating in excess of \$250 with respect to a given election in a calendar year. *CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018) (stay pending appeal lifted Sept. 18, 2018). After the court vacated the regulation, the Commission issued guidance stating that only disclosure reports due after September 18, 2018, would be required to identify each person (other than a political committee) who made a contribution(s) to the reporting person during the reporting period whose contribution(s) had an aggregate amount or value in excess of \$200 within the calendar year, together with the date and amount of such contribution(s) and use memo text to indicate which of these persons made a contribution in excess of \$200 to the reporting person for the purpose of furthering any independent expenditure. *See FEC Provides Guidance Following U.S. District Court Decision in CREW v. FEC*, 316 F. Supp. 3d 349 (D.D.C. 2018), FEC Press Release (Oct. 4, 2018), <https://www.fec.gov/updates/fec-provides-guidance-following-us-district-court-decision-crew-v-fec-316-f-supp-3d-349-ddc-2018/>. This decision does not affect IKY's reporting obligations under the circumstances of this case.

¹⁰

¹¹ *Heckler v. Chaney*, 470 U.S. 821 (1985).

¹² *Id.* In the First General Counsel's Report, we noted that the Complaint did not allege that IKY failed to register and report as a political committee, but it suggested that IKY may be "confused as to its status as a political committee" because IKY acknowledged that its billboards contained express advocacy by including disclaimers on them. *See* First GCR at 11, n.38. We stated that the record shows that IKY satisfied the statutory threshold for political committee status by making independent expenditures in excess of \$1,000, but we lacked sufficient

V. RECOMMENDATIONS

1. Take no further action and issue a letter of caution to Indivisible Kentucky, Inc.;
2. Approve the appropriate letters; and
3. Close the file.

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Acting Associate General Counsel for
Enforcement

Dated: 5.10.19

BY:

Stephen Gura
Stephen Gura
Deputy Associate General Counsel for
Enforcement

Jin Lee
Jin Lee
Acting Assistant General Counsel

Dominique Dillenseger
Dominique Dillenseger
Attorney

information to determine whether its major purpose is federal campaign activity. *Id*; see 52 U.S.C. § 30101(4)(A). Thus, we made no recommendations whether IKY should have registered and reported as a political committee. We also recommended the Commission take no action at that time with respect to the allegation that IKY should have included disclaimers on solicitations on its website, which would have been required if IKY were determined to be a political committee. First GCR at 11, n.38; see 11 C.F.R. § 110.11(a)(1) (all websites of political committees require a disclaimer).

As the investigation did not reveal any additional information that would help determine whether IKY was a political committee, we recommend no further action as to IKY's political committee status and no further action as to the disclaimer allegation regarding its website.